

**OPINION
79-195**

July 16, 1979 (OPINION)

Mr. James Purdy
Dickey County States Attorney
Ellendale, North Dakota 58436

Dear Mr. Purdy:

This is in response to your letter of June 18, 1979, in which you request an opinion from our office concerning the authority of the Dickey County Commissioners to allow microfilming by an abstract company and/or the sale of microfilm to an abstract company, of records of the Dickey County Register of Deeds. In your letter you set forth the following facts and questions:

The Dickey County Abstract Company desires to make a microfilm record of the records of the Dickey County Register of Deeds Office. At present, the office of the Abstract Company is located in the Dickey County Courthouse Building and immediately across the hall from the Register of Deeds Office so that the Abstract Company has had full access to the Records of the Register of Deeds Office. However, the Abstract Company is now contemplating moving out of the Courthouse Building to a separate building and therefore desires to microfilm the Register of Deeds' records and at the cost and expense of the Abstract Company itself. I have enclosed a photocopy of the letter of May 24, 1979, from the Abstract Company to the Dickey County Commissioners.

Dickey County has microfilmed the records from the Register of Deeds Office for about the last five years or so but does not, at this time, have a complete microfilmed record of all of the records with the Dickey County Register of Deeds Office and going back prior to the approximate last five-year period of time.

I have two questions and they are:

1. Is it permissible for the County Commissioners to allow the Abstract Company to have the Register of Deeds' records microfilmed for the Abstract Company and at the expense of the Abstract Company and for the Abstract Company to receive and retain possession of such microfilmed records at its own independent place of business?
2. Is it permissible for the County Commissioners to have the Register of Deeds' records microfilmed at the County expense and a microfilmed copy also to be run at the County expense, and with the Commissioners or the County retaining the microfilm records and then selling the copy of the microfilm records to the Abstract Company for the Abstract Company to retain and use the copy thereof at its own independent place of business?

I have examined section 44-04-18 and sections 12.1-11-05 and 11-10-19 and 43-01-14 and 43-01-15 of the North Dakota Century Code and have also carefully read the Opinion of September 7, 1978, from your office addressed to Mr. Ronald G. Splitt, LaMoure County States Attorney. I recognize that the situation presented by Mr. Splitt to which you addressed your answers in your letter of September 7, 1978, was somewhat different than existing here because in the LaMoure County case, the Abstract Company wanted to retain control regarding access to the microfilm records. Such is not the case here. In the instant situation, the local Abstract Company merely desires to have a microfilm record for its own use and to be paid for at its own expense so that the Abstract Company will be able to carry on its business outside of the Courthouse and after office hours.

As we understand the intentions of the Dickey County Abstract Company and the supposed desires of the Dickey County Commissioners, we would agree that the facts you relate in your inquiry present a different situation than that situation addressed in our letter of September 7, 1978, to States Attorney Ronald Splitt. In our letter to Mr. Splitt we addressed a situation in which both the county commission and the abstract company had intended to share in the expense of microfilming and in which it was apparently intended that both the county commission and the abstract company retain a form of joint ownership and control. In the situation you present it appears clear that more than one copy of all documents are to be made on microfilm, that the abstract company intends to pay for an entire microfilm set itself, and that access to the county's original microfilm records will apparently not be affected.

Section 44-04-18 is certainly applicable to this situation, and it provides as follows:

44-04-18. ACCESS TO PUBLIC RECORDS - PENALTY.

1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
2. Violations of this section shall be punishable as an infraction.

While you have not indicated in your letter which "records" of the Register of Deeds would be copied, we assume for the purposes of this opinion, as we did in our opinion to Mr. Splitt, that the records of the Register of Deeds such as tract indexes, grantor and grantee indexes and reception books, as well as the actual instruments themselves presented for recording, fall within the definition of "records" as used in section 44-04-18.

You are no doubt aware that we have on numerous occasions pointed out that section 44-04-18 does not itself require that copies of records be made and furnished to persons requesting the same. We have also

recognized on several instances, however, that many state agencies follow the practice of providing copies to persons requesting them, and that some agencies make a reasonable charge for this service sufficient to cover the cost of the service. We have, as we say, recognized this practice and suggested only that any such policy of providing copies be applied in a uniform manner and that reasonable rules and regulations might be adopted by the public body to protect the integrity of the agency's files and to make sure that any requests for large numbers of copies do not otherwise disrupt the ongoing work of the agency.

We see no essential difference between the practice of providing paper or xerox copies for a reasonable charge, subject to reasonable regulations, and the proposal that either the commission or the abstract company make microfilm copies of certain records and that the abstract company pay for the microfilming cost, either by the abstract company making the copies themselves at their own expense or by paying for the copies following their making by the county commissioners. The only difference in the situation you present appears to be the mechanical technique of copying and the sheer number of copies to be made.

The Legislative Assembly has recognized the necessity for abstract companies to have access to the records of the registrar's office. Sections 43-01-14 and 43-01-15 provide as follows:

43-01-14. CERTIFICATION OF AUTHORITY - FEE - RENEWAL. - A certificate of authority shall be issued to an applicant who successfully passes the examination of the board and complies with the other provisions of this chapter, upon the payment of the registration fee of twenty-five dollars which shall be in addition to the examination fee. A certificate shall be valid for five years after the date thereof. A certificate shall be renewed by the board upon application, made within thirty days prior to the expiration date, accompanied by the sum of twenty-five dollars and an affidavit that the applicant has for use in his business a complete set of abstract books or records of all instruments of record in the office of the register of deeds in and for the county in which the applicant has his place of business or has been engaged in good faith in the preparation of such books or records for not less than six months.

43-01-15. AUTHORITY AND DUTY OF ABSTRACTER UNDER CERTIFICATE. - The certificate of authority shall authorize the person, firm, or corporation named therein to engage in and carry on the business of an abstractor of real estate titles in the county in which he has his place of business and for that purpose to have access during ordinary office hours to the offices of any county or of the state and to make such memoranda or notations from the records thereof as may be necessary for the purpose of making such abstracts of title. Any person, firm, or corporation holding a certificate shall furnish or continue an abstract of title to any tract of land in the county, when requested to do so, on payment of the fees provided in this chapter.

These sections do not, of course, refer to the abstract company's access for purposes of xeroxing or microfilming, but rather for purposes of making "memoranda or notations". This is not surprising, as these two statutes date to the late eighteen hundreds or early nineteen hundreds, prior to the technology making wholesale copying possible and making interpretation of the county commissioners' authority in this area necessary at all. What these sections do evidence is a legislative recognition of the public service which abstract companies perform and an intention that they be given access for the purposes of the type of copying then technologically available to the companies to assist them in their abstract business. We do not believe the fact that sections 43-01-14 and 43-01-15 neither authorize a copying fee nor authorize any other method of recording the substance of the registrar's records should be read as prohibiting the same. As we have pointed out, the statute could not have been intended to apply to the technology of xeroxing or microfilming.

It is pertinent in commenting on the contemplated transaction between the Dickey County Abstract Company and the Board of County Commissioners to refer again to what we said in our opinion to Mr. Splitt concerning the ownership of public records and their sale. That is, that each case must be determined on a case-by-case basis. In the instance which is the subject of your inquiry we note that even under the alternative by which the microfilm copies would be made by the County Commissioners and sold to the abstract company that the copies would apparently be intended to be made specifically for that purpose and not, as may have been the case addressed in the letter to Mr. Splitt, as the only existing public records on the subject of their contents.

Finally, we note that we do not mean to imply by our answer that the boards of county commissioners must involuntarily, or are authorized on a voluntary basis to embark upon the business of providing copies of public records in a wholesale manner for the purpose of any profit to be gained from that service. It is our belief that any charges made by the commissioners for providing the microfilmed copies should be reasonable and should reflect at least an approximation of the actual cost of the service.

We have enclosed for your information and review correspondence on the general subject of your inquiry, written by this office to Mr. Russell Staiger, Assistant Director, State Planning Division, on February 29, 1978.

In direct response to your questions, we believe under the facts stated in your letter and the assumptions made herein that it is permissible for the County Commissioners to allow the microfilming of the records of the Register of Deeds at the expense of the Abstract Company, or to authorize at the request of the Abstract Company, the sale of microfilmed records directly to the Dickey County Abstract Company.

We trust that the foregoing will be of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General